

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

609
NO. 77-4151

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

PBS
11/10
Petitioner,

v.

NORTHSHORE FABRICATORS AND ERECTORS INC.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

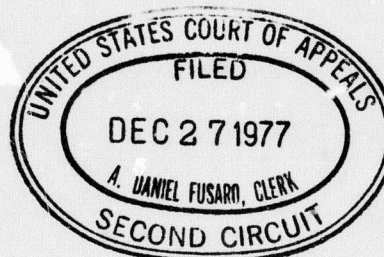
BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

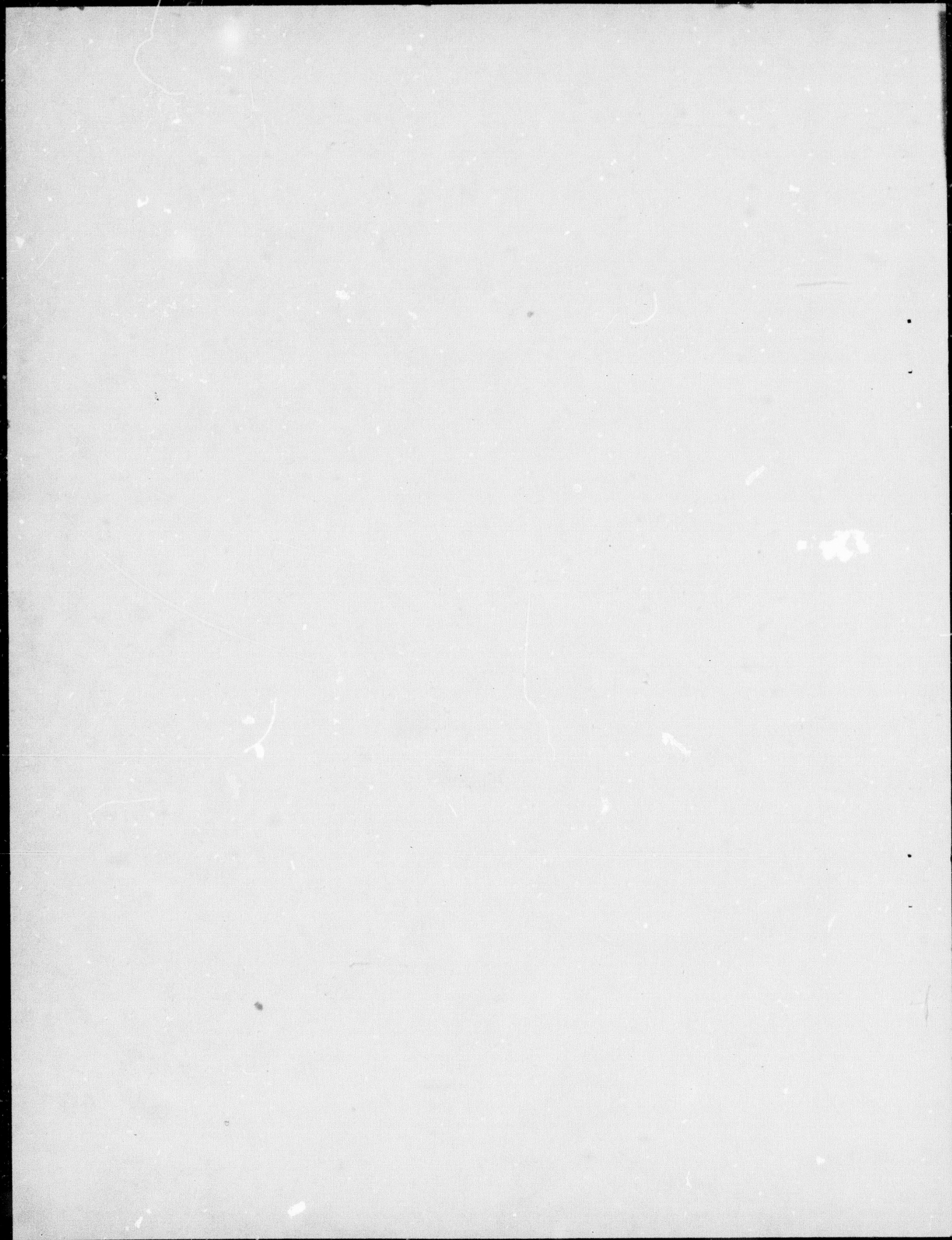
JOHN D. BURGOYNE,
Assistant General Counsel

MARY D. SCHETTE,

Attorney,
National Labor Relations Board.
Washington, D. C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.





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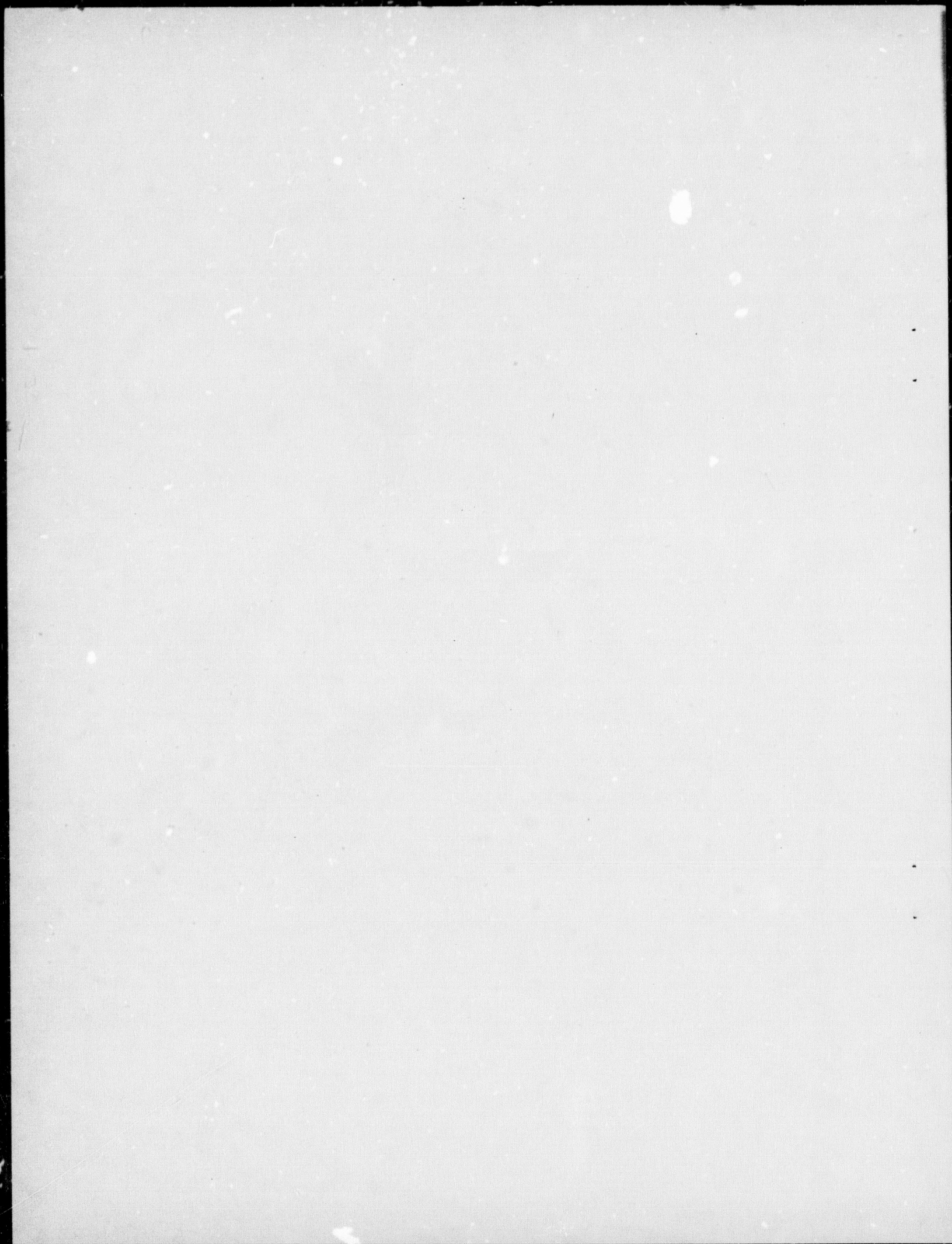
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ON APPLICATION FOR ENFORCEMENT OF AN ORDER
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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUE PRESENTED

Whether the Board properly overruled the objections to the election conducted among the Company's employees, certified the Union as collective bargaining representative, and found that the Company violated Section 8(a)(5) of the Act by refusing to bargain with the Union.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, et seq.), for enforcement of its order (A. 129-141)^{1/}

^{1/} "A." references are to the appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

issued against Northshore Fabricators and Erectors, Inc. ("the Company") on June 21, 1977. The Board's Decision and Order is reported at 230 NLRB No. 46. This Court has jurisdiction of the proceeding, since the unfair labor practice occurred in Ronkonkoma, New York, within this judicial circuit.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the representation proceeding

The Company is a New York corporation with its principal office and place of business in Ronkonkoma, New York, where it is engaged in the shop fabrication and jobsite erection of steel and ornamental metal products. Approximately ten production and maintenance workers are employed at the Ronkonkoma plant (A. 134). On August 26, 1975, Local 819, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 819") filed a petition with the Board requesting certification as collective bargaining representative of these employees (A. 131). Shopmen's Local Union 455, International Association of Bridge, Structural, and Ornamental Ironworkers, AFL-CIO ("the Union") then intervened in the representation proceeding initiated by the filing of the petition, on the basis of a previous multiemployer contract under which it had represented the production and maintenance employees at the Ronkonkoma plant. Following the expiration of that contract on June 30, 1975, a number of plant employees represented by Local 455 had gone out on strike, had been replaced by the Company, and remained on strike throughout the proceedings described herein (A. 131).

After the petition was filed, the Union filed an unfair labor practice charge with the Board contending, in essence, that the Company was obligated to bargain with it as the exclusive representative of the production and maintenance employees. Because of the nature of this charge, the Board was unable to take any further action with respect to Local 819's petition until the charges had been investigated and dismissed—a period of several months (A. 6-7, 46).^{2/} A representation hearing was held on February 4 and 5, 1976. On June 15, 1976, the proceedings were again suspended while the Region investigated and dismissed another unfair labor practice charge filed against the Company by the Union (A. 7, 46). The Director issued a Decision and Direction of Election directing that an election be held in a unit consisting of the Company's production and maintenance employees (A. 1-4). By letter of June 18, 1976, the Union asked the Board's Regional Office to schedule the election on or before June 30, 1976, so that the employees who had gone out on strike the previous year would be eligible to vote^{3/} (A. 6-10). On June 22, 1976,

2/ Section 11730 of the Board's Casehandling Manual, Representation Proceedings (1975), provides:

The Agency has a general policy of holding in abeyance any representation case . . . where pending unfair labor practice charges . . . are based upon conduct of a nature which would have a tendency to interfere with the free choice of the employees in an election. . . .

3/ Section 9(c)(3) of the Act provides that "employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of the Act in any election conducted within twelve months after the commencement of the strike."

the Regional Director received an employee list from the Company, which he mailed to the other parties (A. 16-17).

On June 24, 1976, the Regional Director notified all parties by telegram that the election would be held June 30, 1976 (A. 41). That same day, he also supplied Local 819 with the names and addresses of the striking employees, which the Company, because it believed that the election would not be held until after July 1, had not included among the employee names and addresses which it had previously filed with the Board. Also that day, the Company filed requests with the Regional Director and the Board seeking a stay of the election on the ground that the Board was improperly deviating from its usual requirement that the employee list be submitted ten days before the election. Local 819 filed a similar request with the Board (A. 11-15, 41). These requests were subsequently denied (A. 24).

The election was held June 30, 1976, as scheduled, at the Ronkonkoma plant (A. 28).^{4/} Sixteen votes were cast, all of which were challenged (A. 28). The ballots were then impounded, pending the Board's ruling on the Union's request for review, filed June 25, of the Decision and Direction of Election issued June 15 (A. 18, 100).

On July 1 and July 6, 1976, respectively, Local 819 and the Company filed timely objections to the election (A. 26-27, 102-103). Local 819's objections alleged: (1) the Company's employee list was incomplete in that

^{4/} Because the Company refused to allow the polls to be set up on its premises, the election was held, for the most part, in a bus parked in front of the plant (A. 43, n. 17).

it omitted nearly 50 percent of the eligible voters; (2) the list of eligible voters was not given to Local 819 sufficiently in advance of the election; (3) the Company did not post the notice of election; (4) the Company campaigned against the Union up to and including the time when the election was held; (5) the Company threatened the employees with going out of business if a union won the election; (6) campaign literature contained untrue statements; (7) campaign literature contained misleading statements made at a time when Local 819 had no opportunity to rebut them; (8) the election was held at a location where voters could see a Company antiunion sign; (9) the Board permitted the ballots to be cast in a place other than that designated in its order; (10) ballots were cast in the open air, so that there was no ballot secrecy; (11) the Board failed to schedule the election at a location which would have ensured voter safety; (12) the normal election process was not adhered to when "unilateral applications were made to Washington without notice to all parties and without all parties being given an opportunity to be heard"; (13) the Region failed to conform to the usual rules and regulations governing the conduct of elections; (14) the Region did not give sufficient and timely notice of the election (A. 102-103). The Company, in its single objection to the election, contended that it "did not have sufficient time to campaign amongst the strikers from the announcement by the Region of their eligibility" (A. 27). The Company also attacked the propriety of the timing of the election in its challenges to the ballots cast by the strikers (A. 26-27).

On August 19, 1976, the Board denied the Union's request for review of the Decision and Direction of Election (A. 99). Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended (29 C.F.R.), the Regional Director then carried out an administrative investigation of Local 819's and the Company's objections and challenges. On September 1, 1976, the Regional Director issued a Supplemental Decision on Objections and Challenged Ballots, in which he recommended that all of the objections to the election be overruled (A. 28-49). In addition, he recommended overruling the challenges to eight of the ballots, sustaining three challenges, and holding a hearing on the remaining three challenges if the eight ballots to which challenges were overruled proved not to be determinative (A. 30-39). Local 819 then filed timely exceptions with the Board to the Regional Director's Report, contending that its objections 1 through 7, and 11 through 14 had been improperly overruled and should have constituted grounds for setting aside the election. It did not except to the Director's resolution of the challenges (A. 50-81). The Company filed no exceptions of any kind. On November 17, 1976, the Board denied Local 819's exceptions, and the subsequent tally of ballots showed that all of the eight ballots to which challenges had been overruled were cast for the Union (A. 106). Since these ballots were sufficient in number to be determinative of the election, no resolution of the remaining challenges was necessary, and on December 7, 1976, the Union was certified as the collective bargaining representative of the Company's production and maintenance employees at the Ronkonkoma plant (A. 133).

B. The unfair labor practice proceeding

By letter of November 29, 1976, the Union asked the Company to begin meeting for the purposes of negotiating a collective bargaining agreement (A. 108). When the Company rejected this request, the Union filed an unfair labor practice charge with the Board, which resulted in the issuance, on January 25, 1977, of a complaint against the Company charging it with an unlawful refusal to bargain (A. 83-86, 109). On February 4, 1977, the Company answered the Board's complaint, admitting that it had refused to bargain, but denying the validity of the Board's certification (A. 130). The General Counsel then filed a motion to transfer the case to the Board and a motion for summary judgment, to which the Board responded, on March 7, 1977, by issuing an order transferring the proceeding to itself and a notice to show cause why the General Counsel's motion should not be granted. The Company then filed a cross-motion for summary judgment, restating its position challenging the validity of the election and the resulting certification (A. 88-109, 110-128).

II. THE BOARD'S CONCLUSIONS AND ORDER

On June 21, 1977, the Board issued its Decision and Order, granting the General Counsel's motion for summary judgment and finding the Company's refusal to bargain a violation of Section 8(a)(5) and (1) of the Act. In so finding, the Board noted that all of the issues raised by the Company in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company neither offered to adduce any newly discovered or previously unavailable evidence, nor alleged any special circumstances which would require the Board to re-examine the decision made in the representation proceeding (A. 129-141).

The Board's order requires the Company to cease and desist from the unfair labor practice found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights, to bargain with the Union upon request, and to post appropriate notices (A. 139-140).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE DULY CERTIFIED REPRESENTATIVE OF ITS EMPLOYEES

A. Introduction

The Company concededly has refused to bargain with the Union on the ground that the certification is invalid. As noted, the Company, in the unfair labor practice proceeding before the Board, attacked the Union's certification essentially on the basis of its own objections to the election and challenges, which had been resolved adversely to it by the Board's Regional Director in the representation proceeding. However, as stated supra, p. 6, the Company, in the representation case, never filed any exceptions with the Board to the Director's adverse rulings. It is well settled that the Company's failure in this respect bars the Company from raising these objections and challenges before this Court. N.L.R.B. v. Rexall Chemical Co., 370 F. 2d 363, 365-366 (C.A. 1, 1967); N.L.R.B. v. Rod-Ric Corporation, 428 F. 2d 948, 950-951 (C.A. 5, 1970), cert. denied, 401 U.S. 937; M.P.C. Cash-Way Lumber Company v. N.L.R.B., 452 F. 2d 1197, 1198 (C.A. 6, 1971); Keco Industries, Inc. v. N.L.R.B., 458 F. 2d 1356, 1357 (C.A. 6, 1972); N.L.R.B. v. Thompson Transport Co., 406 F. 2d 698, 701-702 (C.A. 10, 1969); Retail Clerks Union, Local 1401 v. N.L.R.B., 463 F. 2d 316, 321-325 (C.A. D.C., 1972). See also, N.L.R.B. v. Newton-New Haven Company, 506 F. 2d 1035, 1038 (C.A. 2, 1974). Nonetheless, as also stated supra, p. 6, Local 819 did file timely exceptions with the

Board to certain of the Director's rulings, and these exceptions are properly before the Court, at least to the extent that they draw into question the actions of the Union or the Board in conducting the election.^{5/}

The issue, then, is whether the Board, in overruling the objections of Local 819, abused the wide degree of discretion vested in it by Congress with respect to representation matters. As this Court has stated, "The conduct of representation elections is the very archetype of administrative function, with no quasi about it, concerning which courts should not interfere except for the most glaring discrimination or abuse." N.L.R.B. v. Olson Bodies, Inc., 420 F. 2d 1187, 1189 (C.A. 2, 1970), cert. denied, 401 U.S. 954. Accord: N.L.R.B. v. A. J. Tower Co., 329 U.S. 324, 330 (1946); N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969); Bausch and Lomb, Inc. v. N.L.R.B., 451 F. 2d 873, 877 (C.A. 2, 1971). The burden of proof is on the objecting party to show by specific evidence that the election was not fairly conducted. N.L.R.B. v. Mattison Machine Works, 365 U.S. 123, 123-124 (1961). We show below that the Board acted well within its discretion in finding that this burden was not met in this case.

^{5/} The exceptions of Local 819 which challenged the actions of the Company cannot be relied on by the Company, for it is well settled that in objecting to an election, an employer may not "take advantage of wrongdoing for which he has an operational responsibility." N.L.R.B. v. Air Control Products of St. Petersburg, 335 F. 2d 245, 250 (C.A. 5, 1964).

B. The Board properly overruled the objections to the timing of the election

Both the Company ^{6/} and Local 819 objected to the timing of the election on the ground that it was not in accordance with the Board's "rules and regulations," apparently referring to the provisions of the Board's Casehandling Manual, Representation Proceedings (1975). ^{7/} Under these provisions, an election ordinarily is scheduled no less than 25 days after the Direction of Election, and "ten days after the Regional Director has received the list of names and addresses of the eligible voters." Casehandling Manual, Representation Proceedings, Section 11302.1. Here, as noted in the Statement of Facts, the election was held 15 days after the Direction of Election and six days after the Regional Director received an employee list from the Company. This was done in response to a letter from the Union, pointing out that any later scheduling of the election would result in the disenfranchisement of nearly half the employees in the unit--namely, the replaced strikers who had gone out on July 1, 1975, and who, under Section 9(c)(3) of the Act, ^{8/} would have lost their right to vote as of July 1, 1976. Nonetheless, the Company and Local 819 contended that the Regional Director was required to reject this request and hold the election in conformity with the usual procedures.

^{6/} The Company did preserve its position on this matter by asking the Board for a stay of the election, supra, p. 4.

^{7/} The Board's Rules and Regulations, Series 8, as amended (29 C.F.R.), contain no provision concerning the timing of elections.

^{8/} See n. 3, supra.

The Board properly rejected this contention. Initially, the law is clear that the Board's discretion with respect to the conduct of elections extends to all aspects of the election process, including "the selection of a proper time for holding the election." N.L.R.B. v. Keller Aluminum Chairs, 425 F. 2d 709, 710 (C.A. 5, 1970). Accord: Louis-Allis Co. v. N.L.R.B., 463 F. 2d 512 (C.A. 7, 1972), and cases cited. Moreover, the Board and courts have consistently recognized that the provisions of the Casehandling Manual are merely guidelines for the exercise of this discretion, clearly not requiring inflexible adherence under all circumstances. See, e.g., N.L.R.B. v. Schwartz Brothers, Inc., 475 F. 2d 926, 929 n. 3 (C.A. D.C., 1973); Pole-Lite Industries, Ltd., 229 NLRB No. 6, sl. op. pp. 3-6, 95 LRRM 1080, 1080-1082 (1977); Commercial Air Conditioning, Inc., 226 NLRB No. 158, sl. op. pp. 1-4, n. 8, 94 LRRM 1141, 1142, n. 8 (1977). Compare, Terminal Freight Handling Co. v. Solien, 444 F. 2d 699, 709 (C.A. 8, 1971) cert. denied 405 U.S. 996; N.L.R.B. v. Albritton Engineering Corp., 340 F. 2d 281, 285-286 (C.A. 5, 1965) cert. denied, 382 U.S. 815. Indeed, the introduction to the Board's Casehandling Manual specifically provides that "the guidelines included are not Board rulings or directives, and although it is expected that they will be followed by staff employees in the handling of cases, it is also expected that there may be departures through exercise of professional judgment in varying circumstances. They are not intended to be and should not be viewed as binding procedural rules."

The Board has long held, moreover, that standard procedures for scheduling elections need not be strictly observed where, as here, an

election has already been directed, and adherence to those procedures would result in the disenfranchisement of strikers, pursuant to Section 9(c)(3) of the Act. Kingsport Press, Inc., 146 NLRB 260, 264-265, and 146 NLRB 1111, 1112-1113 (1964), employer denied injunction against election, Kingsport Press, Inc. v. McCulloch, 336 F. 2d 753 (C.A. D.C., 1964), cert. denied, 379 U.S. 931. Accord: Harlem River Consumers Cooperative, 191 NLRB 314, 324 (1971); American Metal Products Company, 139 NLRB 601, 604-605 (1962). See also, Baptist Medical Center-Princeton, 216 NLRB 516, 517 (1975). Such a result, in the Board's view, would be inconsistent with the intent of Congress in enacting Section 9(c)(3). Thus, the legislative history of that Section discloses that it was passed in its present form to reverse the effect of its predecessor, which provided that "employees on strike who are not entitled to reinstatement shall not be entitled to vote." The purpose of the amendment, as stated by Senator Kennedy, was "to permit economic strikers to vote while there is a lawful strike in progress," (105 Cong. Rec. 5864, 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1138 (1959), subject only to a one-year eligibility limitation and regulations consistent with that purpose, or, as the Court put in Bio-Science Laboratories v. N.L.R.B., 542 F. 2d 505, 507 (C.A. 9, 1976), "to limit the potential for 'union busting'" In scheduling any election involving strikers, therefore, the Board properly recognizes that the dictates of its customary internal procedures must yield to this Congressional policy, and the election, if possible, be timed to effectuate the strikers' right to vote. Compare, Miami Printing Pressmen's Union Local 46 v. McCulloch, 322 F. 2d 993, 998-999 (C.A. D.C., 1963).

Thus, as the Board found, the Regional Director's decision to deviate somewhat from the provisions of the Casehandling Manual in scheduling the election was clearly not grounds for setting the election aside. Rather, as shown above, that decision was fully consistent with the applicable legal precedents and policies of the Act.

The Company and Local 819 further objected to the scheduling of the election on the ground that there was insufficient time to campaign among the strikers from the announcement by the Region of their eligibility (A. 102-105). The controlling issue in this regard, of course, is whether the election's timing deprived the employees of a free choice by giving them an unreasonably short period in which to be informed as to the election issues. See Louis-Allis Co. v. N.L.R.B., 463 F. 2d 512 (C.A. 7, 1972). Here, neither the Company nor Local 819 made such a showing. Thus, as the Regional Director noted in his Decision (A. 46-47), "the petition, although blocked, had been on file for fully nine months at the time of the election. All parties were aware of the actions and identities of the others, and the affected employees had numerous opportunities to query all parties. The employees also had ample opportunity to discuss the entire situation among themselves. Further, the shortened period fell on all parties equally." Indeed, given the date of the filing of the petition, it seems highly unlikely that the Company neglected to communicate with the strikers about election issues on the assumption that they would not participate in the election. Furthermore, the record affords no basis for a contention that the employees were deprived of any specific information which

they needed in order to make a knowledgeable decision. Accordingly, we submit, this objection to the timing of the election, too, was properly rejected by the Board.^{9/}

C. The Board properly overruled the objection alleging that coercion precluded a fair vote

As noted in the Statement of Facts, Local 819 filed an objection alleging, in essence, that the location of the polls at Company premises caused potential voters to fear for their safety, so that it was impossible for them to vote freely.^{10/} In support of its objection, Local 819 produced a witness who alleged that incidents of rock or bottle throwing

^{9/} Local 819 also objected to the timing of the election on the ground that Local 455's letter regarding the date of the election was an ex parte communication prohibited by Sections 102.26 and 102.28 of the Board's Rules and Regulations (29 C.F.R.). As the Supplemental Decision on Objections and Challenged Ballots noted, however, "Local 455's communication to the Regional Office concerning the election date occurred after the Regional Director's decision had been issued, and concerned a matter regularly dealt with by the Regional Director administratively." (A. 48). Accordingly, that letter was clearly not the sort of communication concerning the substantive issues decided on the basis of a representation hearing at which the Board's Rules are directed.

^{10/} Local 819 couched its objection and exceptions in this regard as an attack on the Regional Director for "failing to ensure voter safety" by rejecting its request to hold the election at the Board's Regional Office rather than at Company premises (A. 103). However, as the Supplemental Decision on Objections and Challenged Ballots and Local 819's brief in support of its exceptions to that decision indicate, the relevant issue in determining whether the election should have been set aside on the basis of this objection is not whether the Local's request supplied the Regional Director with sufficient grounds for moving the election from the customary location at Company premises (see Casehandling Manual, Representation Proceedings, Section 11302.2), but whether certain incidents allegedly occurring in connection with those premises precluded the holding of a fair election there.

occurred at or near the Ronkonkoma plant during the strike. He also stated that on one occasion a car driven by a replacement employee through the picket line at the plant was hit by some pickets with golf clubs.^{11/}

he applicable principles in assessing an election objection such as this one are well established. Thus, the law is clear that a party to an election "bears a heavy burden in charging that . . . coercion prevented a fair election." Shoreline Enterprises v. N.L.R.B., 262 F. 2d 933, 942 (C.A. 5, 1959). In order to meet this burden, the party must show not only that coercive conduct occurred, but that it was "so related to the election as to have had a probable effect on the employees' actions at the polls." Amalgamated Clothing Workers of America v. N.L.R.B., 424 F. 2d 818, 826-827 (C.A. D.C., 1970). In assessing the probable influence of particular incidents on an election, moreover, the Board accords "less weight" to conduct which is attributable to neither party than to "similar conduct attributable to the employer who has or to unions who seek control over employees' working conditions." Orleans Mfg. Co., 120 NLRB 630, 633 (1958). Accord: N.L.R.B. v. Griffith Oldsmobile, Inc., 455 F. 2d 867, 870 (C.A. 8, 1972); Intertype Co. v. N.L.R.B., 401 F. 2d 41, 46 (C.A. 4, 1968), cert. denied, 393 U.S. 1049. Since, as a practical matter, neither the Board nor the parties can control third party

^{11/} Local 819 also supported this objection with some evidence of incidents involving the Union and another labor organization in an area more than 35 miles from the Ronkonkoma plant (A. 45). In its exceptions to the Regional Director's Decision, however, it failed even to mention these incidents, thus apparently indicating that it recognized that they were far too remote in every respect from the election at issue here to have had an objectionable impact on it.

misconduct, the Board justifiably refuses to set aside elections on the basis of such misconduct unless its probable coercive impact was so strong as to "make a free expression of choice of representation impossible." Bush Hog, Inc. v. N.L.R.B., 420 F. 2d 1266, 1269 (C.A. 5, 1969). "To do otherwise would be to invite endless repetition of elections, without any assurance that those which follow would be any fairer than their predecessors." N.L.R.B. v. Staub Cleaners, Inc., 418 F. 2d 1086, 1088 (C.A. 2, 1969), cert. denied, 397 U.S. 1038.

Applying these principles here, the Board properly rejected Local 819's objection. Thus, the single witness produced by Local 819 failed to supply any information, including identification, showing that the individuals involved in the alleged incidents of violence were union officials or acted with the Union's authority or approval. Accordingly, these incidents could not be attributed to the Union. Abbott Laboratories v. N.L.R.B., 540 F. 2d 662, 667 (C.A. 4, 1976); Macomb Pottery Co. v. N.L.R.B., 376 F. 2d 450, 454 (C.A. 7, 1967). Nor was he able to recall any circumstances surrounding the incidents, such as the number of employees involved, to establish that the likely impact of these incidents, taking place sporadically over a period of 12 months, would have been to create a generally coercive atmosphere at the time of the election. See, United Steelworkers of America, AFL-CIO v. N.L.R.B., 496 F. 2d 1342, 1346-1348 (C.A. 5, 1974); N.L.R.B. v. Monroe Auto Equipment Co., 470 F. 2d 1329, 1332 (C.A. 5, 1972)^{12/} cert. denied, 412 U.S. 928. Furthermore, there were no arrests or

^{12/} Compare, N.L.R.B. v. Singleton Packing Corp., 418 F. 2d 275, 281 (C.A. 5, 1969), cert. denied, 400 U.S. 824 (threats of violence if employee crossed picket line, to be set up after election, and

convictions arising out of these incidents which might have substantiated their seriousness. Indeed, as the Regional Director pointed out in his Decision (A. 45), neither Local 819 nor its members even filed any charges with the Board concerning this alleged misconduct. And, finally, as the Regional Director further noted (A. 45), there was no evidence that any of the voters who presented themselves at the polls were threatened by the pickets present at that time. Accordingly, Local 819 failed to make the necessary showing of likely prejudice to the fairness of the election to require that this objection be sustained.

In its exceptions to the Regional Director's Supplemental Decision on Objections and Challenged Ballots, filed with the Board as a Request for Review of that decision, Local 819 appended an additional employee affidavit. This affidavit had not been submitted to the Regional Director for investigation in connection with the election objections. In the affidavit, the employee repeated the allegations of the first affiant concerning picket line rock-throwing incidents. He also stated that he received some threats and some anonymous threatening phone calls concerning

12/ (Continued)

bombing of her house if she failed to vote not shown to have "destroyed the atmosphere necessary for free choice in the election"); Macomb Pottery Co. v. N.L.R.B., *supra*, 376 F. 2d at 454 (threatening telephone conversations and dynamiting threat "were insufficient, if they occurred, to create an atmosphere of fear and reprisal"); Amalgamated Clothing Workers of America v. N.L.R.B., *supra*, 424 F. 2d at 826-827 (where union won election 142 to 128, with 3 challenged ballots, evidence that six employees were threatened or harassed by third parties not sufficient to establish coercive environment "so related to the election as to have had a probable effect upon the employees' actions at the polls").

his working during the strike, and that he was involved in an incident in which an employee's car was followed and forced off the road. This affidavit suffered from the same deficiencies as the first. Thus, although the affiant repeatedly referred to the individuals involved in the alleged incidents as "Local 455" pickets, he failed to identify them in any manner which would charge the Union with responsibility for their deeds. Moreover, he gave no other details concerning the alleged incidents to show that the incidents would have been likely to have an impact on the election. The failure to supply even approximate dates for any of the incidents was especially notable in this regard, since the proximity of misconduct to an election clearly would have a substantial bearing on the misconduct's likelihood of interference with that election. See, for example, N.L.R.B. v. Bill's Institutional Commissary Corp., 418 F. 2d 405, 406 (C.A. 5, 1969). Accordingly, the Board properly determined that Local 819's exceptions furnished no basis for reversing the Regional Director's original disposition of this objection.^{13/}

The propriety of the Board's determination, moreover, is not affected by the additional statements contained in the affidavit to the effect that the incidents described caused the affiant to be fearful of going to work, and to refrain from voting in the election. For, in determining whether

^{13/} By failing to request a hearing on this or any of its election objections, Local 819 indicated its willingness to have the Board decide the objections on the basis of the information before it. Accordingly, the Company cannot object herein to the Board's resolution of those objections without a hearing. See N.L.R.B. v. Mar Salle, Inc., 425 F. 2d 566, 571 n. 8 (C.A. D.C., 1970), and cases cited supra, p. 9.

to set aside an election, the Board, with court approval, looks to the nature of the objectionable conduct alleged to determine its probable effect, and will not entertain subjective evidence as to the actual impact of that conduct on the employees' state of mind during the election. See, N.L.R.B. v. Southern Health Corp., 514 F. 2d 1122, 1126 (C.A. 7, 1975); N.L.R.B. v. Trancoa Corp., 303 F. 2d 456, 461 (C.A. 1, 1962).^{14/} The Board's refusal to consider this type of evidence serves to preclude unscrupulous employers or unions from attempting to overturn unfavorable election results by pressuring employees to come forward and state that they were coerced by the other side or voted under a misunderstanding. See, N.L.R.B. v. A. J. Tower Co., supra, 329 U.S. at 331-332; Harlan #4 Coal Co. v. N.L.R.B., 490 F. 2d 117, 122-123 (C.A. 6, 1974), cert. denied, 416 U.S. 986; Semi-Steel Casting Co. v. N.L.R.B., 160 F. 2d 388, 392 (C.A. 8, 1947), cert. denied, 332 U.S. 758. The Board's policy also comports with the Supreme Court's rejection of "any rule that requires a probe of the employees' subjective motivation as involving an endless and unreliable inquiry," N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 608 (1969), and effectuates the Congressional intention that representation matters be resolved with prompt-^{15/}ness and finality. Boire v. Greyhound, 376 U.S. 473, 478 (1964).

^{14/} In any event, had the Board considered this evidence, the mere fact that a single employee failed to vote out of fear of the Union would not establish that a general atmosphere of coercion, precluding employee free choice, prevailed at the time of the election. Compare, Manning, Maxwell & Moore, Inc. v. N.L.R.B., 324 F. 2d 857, 858 (C.A. 5, 1963); and cases cited supra, pp. 17-18.

^{15/} Equally without relevance to the Board's review of the Regional Director's Decision was Local 819's contention, in its exceptions, that an inference of coercion should have been drawn from the number and the identities of the employees who actually voted. Thus,
(Continued)

CONCLUSION

For the foregoing reasons, we respectfully submit that a judgment should be entered enforcing the Board's order in full.

JOHN D. BURGOYNE,
MARY SCHUETTE,

Attorneys,

National Labor Relations Board.
Washington, D. C. 20570

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,

National Labor Relations Board.

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15/ (Continued)

Local 819 stated, "with the exception of one employee and four management employees, only Local 455 strikers cast ballots" (A. 71). In the first place, this statement is inaccurate, since the record shows that there were eight non-striking voters, only one of whom was found not to have been employed during the eligibility period. Furthermore, the law is clear that, in the absence of evidence, not present in this case, that the employees' right to vote was interfered with, the Board will not speculate as to the reasons for the size of voter turnout. Valencia Service Company, 99 NLRB 343, 344 (1952). "It has repeatedly been held, under well recognized rules attending elections, that those not participating in the election must be presumed to assent to the will of the majority of those voting, so that such majority determines the choice." N.L.R.B. v. Deutsch Company, 265 F. 2d 473, 479 (C.A. 9, 1959) cert. denied, 361 U.S. 963, and cases cited; N.L.R.B. v. Singleton Packing Corp., supra, 418 F. 2d at 278-279.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 77-4151
	)	
NORTHSHORE FABRICATORS AND	)	
ELECTORS, INC.,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

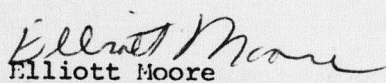
The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case has this day been served by first class mail upon the following counsel at the addresses listed below:

Sanford E. Pollack, Esq.
Guterman and Pollack
71 South Central Avenue
Valley Stream, New York 11580

Belle Harper, Esq.
Sipser, Weinstock, Harper, Dorn &
Leibowitz
380 Madison Avenue
New York, New York 10017

Local 819, International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and
Helpers of America

Att: Robert Jay Dinerstein, Esq.
Lesser, Dinerstein & Associates, P.C.
Suite 2109
29 Court Street
Brooklyn, New York 11242


Elliott Moore

Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.

this 19th day of December, 1977.

